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No. 97-759

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Supreme Court of the United States
OCTOBER TERM, 1997

JAMES W. CILECEK, M.D.,
Petitioner,
v.
INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS OF NORTHERN VIRGINIA, LTD. and THOM A. MAYER, M.D.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE WOMEN'S LEGAL DEFENSE FUND, THE NATIONAL EMPLOYMENT LAW PROJECT, THE NATIONAL WOMEN'S LAW CENTER, AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae are women's rights, employment rights, and labor organizations that work to eliminate all forms of discrimination from the workplace.[1] The question presented

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici* made a monetary contribution to the preparation or submission of this brief.

[Continued]

by this case is of great interest to *amici* because the outcome will determine whether federal civil rights protections will extend to large numbers of workers who are mislabeled as "independent contractors" while actually functioning as employees. Unless courts carefully examine the underlying facts of how a worker's job is performed and controlled—rather than deferring to an employer's characterization of the worker as an independent contractor—the reach of federal anti-discrimination laws will be significantly and inappropriately constricted.

SUMMARY OF ARGUMENT

Millions of American workers are characterized by their employers as "independent contractors." However, many of these workers actually perform the same work under the same conditions as "employees"—and, indeed, employers have substantial economic incentives to misclassify "employees" as "contractors." Unless courts explore the underlying factual circumstances to determine whether employers have actually retained supervision and control of the terms and conditions of their workers' jobs, employers can and will avoid their responsibilities under federal civil rights laws by misclassifying workers as "independent contractors." Determining the appropriate level of deference due an employer's characterization of a worker as an "independent contractor" will help determine the availability of Title VII and related protections to a substantial number of American workers.

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[1] [Continued]

Petitioner and Respondents have consented to the filing of this brief, and the parties' letters of consent have been filed with the Clerk of this Court.

Individual statements of interests of the *amici* are attached as the Appendix to this brief.

REASONS FOR GRANTING THE PETITION

THE OUTCOME OF THIS CASE WILL HELP DETERMINE THE AVAILABILITY OF TITLE VII AND RELATED EMPLOYMENT PROTECTIONS TO THE LARGE NUMBERS OF WORKERS WHO ARE CLASSIFIED AS "INDEPENDENT CONTRACTORS" EVEN THOUGH THEY ACTUALLY FUNCTION AS "EMPLOYEES."

More than 8,300,000 American workers are characterized as independent contractors. Bureau of Labor Statistics, U.S. Dep't of Labor, Rep. 900, *Current Population Survey, Contingent Work Supplement* (1995); Anne E. Polivka, *Contingent and Alternative Work Arrangements, Defined*, 119 Monthly Lab. Rev. 3, 8 tbl.1 (Oct. 1996).

Often, these "contractors" do the same work under the same conditions as "employees," but without the protections of Title VII and other employment laws.[2] For example, in a recent decision, the Ninth Circuit refused to conclude that workers were "independent contractors" merely because they had signed "contracts" characterizing them as such, and instead examined whether they were performing the work of regular employees. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1008, 1011-12 (9th Cir. 1997) (en banc). The court ruled that Microsoft had misclassified a large pool of workers as "independent contractors." *Id.* Similarly, the Second Circuit has noted that it is common practice in the garment industry to "contract out" work that had previously been done in-house, in large part to escape coverage of employment laws.

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[2] As the United States and the Equal Employment Opportunity Commission ("EEOC") noted in their *amici* brief below, "[i]ncreasingly, employers rely on persons who are labeled 'contractors' to accomplish tasks previously performed by full-time employees," and "[s]ome commentators have observed that misclassification of employees as 'independent contractors' is a widespread occurrence.'" Brief *Amici Curiae* on Appeal at 17 n.10 (citations omitted).

Jou-Jou Designs v. Int'l Ladies Garment Workers Union, 643 F.2d 905, 906 (2d Cir. 1981).

In fact, many of these "contractors" continue to perform the same work they previously performed as "employees" for the same employer. For example, 19.2 percent of female workers and 25.1 percent of male workers who identified themselves as independent contractors paid on a wage or salary basis reported that they had been switched from another status with their current employer to that of contractor. Anne E. Polivka & Jay Stewart, *Into Contingent and Alternative Employment: By Choice?*, 119 Monthly Lab. Rev. 55 (Oct. 1996). Similarly, the New York Times recently reported that up to one-fifth of independent contractors were formerly employees of the companies for which they now work as contractors. Louis Uehitelle, *More Downsized Workers Are Returning as Rentals*, N.Y. Times, Dec. 8, 1996, at A1.

Indeed, employers have a wide range of financial incentives to misclassify employees as "independent contractors." As the bipartisan Commission on the Future of Worker-Management Relations recently observed:

> [A]n employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, workers' compensation, and health insurance, will save the administrative expense of withholding, and will be relieved of responsibility to the worker under labor and employment laws. The worker will lose the protections of those laws and benefits and the employer's contribution to Social Security, but may accept the arrangement nonetheless because it gives him or her an opportunity for immediate and even illegitimate financial gains through underpayment of taxes. Many low-wage workers have no practical choice in the matter.

Commission on the Future of Worker-Management Relations, *Report and Recommendations* 35-36 (1994); *see also* General Accounting Office, Pub. No. GAO/HRD-91-56, *Workers At Risk: Increased Numbers in Contingent Employment Lack Insurance, Other Benefits* 21 (1991) (by characterizing workers as "contractors," employers often hope to avoid paying taxes and fringe benefits and to avoid defending against employment law claims); Ellen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 Stetson L. Rev. 1, n.25 (1996) (noting that "significantly lower labor costs are an attractive reason for designating employed persons as independent contractors and not employees").

Given the financial advantages of misclassification, it is not surprising that the Internal Revenue Service estimated that as many as 3.4 million workers are misclassified as independent contractors. H.R. Rep. No. 101-979, at 4 (1990) (citing *Tax Revenue Losses and Tax Administration Problems Involving Independent Contractors: Hearing Before the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations*, 101st Cong. 76 (1989)). Indeed, a General Accounting Office sample study found that 38 percent of employers intentionally or unintentionally misclassified employees as independent contractors. *Id.* (citing General Accounting Office, Pub. No. GAO/GGD 89-107, *Tax Administration Information: Returns Can Be Used to Identify Employers Who Misclassify Employees* 5 (1989)). The IRS further estimated that misclassification cost the federal government a staggering $1.5 billion in income, Social Security, and unemployment tax revenue each year. *Id.*

While classifying workers as independent contractors confers certain economic advantages upon employers, too often it carries grave consequences for the workers themselves. As this case and others demonstrate, misclassification may strip workers of important civil rights and other

employment protections under Title VII, the Age Discrimination in Employment Act, ERISA, the National Labor Relations Act, the Family and Medical Leave Act, and unemployment compensation laws.

Absent legal protections, workers have less bargaining power when negotiating for pay and benefits. For example, women classified as independent contractors have median weekly earnings of only $361—compared to $410 for women and $543 for men characterized as "employees." Steven Hipple & Jay Stewart, *Earnings and Benefits of Workers in Alternative Work Arrangements*, 119 Monthly Lab. Rev. 47 (Oct. 1996). Women managers and professionals who are in independent contractor arrangements earn ten percent less than women managers and professionals in "regular" arrangements; women in blue-collar occupations earn 23 percent less. Economic Policy Institute & Women's Research & Education Institute, *Managing Work and Family* 39 (1997). Women of color classified as independent contractors make even less. Economic Policy Institute & Women's Research & Education Institute, *Nonstandard Work, Substandard Jobs* 29 tbl.17 (1997). Only two percent of women classified as independent contractors have health insurance through their jobs, compared to 55 percent of women "employees." Hipple & Stewart, *supra*, at 52 tbl.5. And only two percent have pension plans through their jobs, compared to 54 percent of women in "traditional" arrangements. *Id.* at 53 tbl.6. Given all the adverse economic consequences, it is not surprising that as many as 800,000 workers classified as "contractors" would prefer a traditional employment relationship. Bureau of Labor Statistics, *supra*, at tbl.11 (9.8 percent of the over eight million independent contractors would prefer a traditional relationship).

In sum, unless courts carefully examine these relationships—rather than relying on employers' often self-serving characterization of their workers as independent contractors—large numbers of workers will be denied improperly

the protection of Title VII and other key civil rights laws. Because this case presents the question of the level of deference due an employer's classification of a worker as an independent contractor, its resolution will help determine whether thousands, and perhaps millions, of workers are entitled to key anti-discrimination and employment protections.

CONCLUSION

For the reasons presented above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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